In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 77-1388.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
CHARLES F. WHITE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief of Petitioner.

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Argument.

I. THE DECISION OF THE SUPREME JUDICIAL COURT CONSTITUTES A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(3).

In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court set out four categories of cases in which a decision of

the highest court of a state on a federal issue had been deemed a final judgment for the purposes of 28 U.S.C. § 1257, even though further state proceedings might follow.

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481.

The instant case falls within that third category. Here the federal claim, that statements and evidence seized in the absence of a knowing and intelligent waiver of rights enumerated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be suppressed, has been finally decided. Although the Commonwealth might theoretically proceed to retry the defendant, review of the federal issue could not be had whatever the ultimate outcome.

In *Cox*, this Court referred to *California* v. *Stewart*, 384 U.S. 436 (1966), as epitomizing this category of cases. 420 U.S. at 481. In *Stewart*, the Court denied the respondent's motion to dismiss the writ of certiorari for lack of a final judgment, stating:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

The Commonwealth would be similarly precluded from appeal should the defendant be retried and acquitted. In addition, the decision of the Supreme Judicial Court carries with it greater finality than did the decision of the highest court of California in *Stewart*. As noted by Mr. Justice Harlan, the California Supreme Court had not finally excluded the challenged confession, but had "left the State free to show proof of a waiver." *Miranda* v. *Arizona*, 384 U.S. 436, 525 (Harlan, J., dissenting). No such further litigation of the issue is left to the Commonwealth in the instant case.

Therefore, the petitioner suggests that the requisite finality, as interpreted in *California* v. *Stewart*, is present in the instant case and that this Court has properly exercised its discretion in granting the writ in order to determine a serious question of federal law.

II. The Supreme Judicial Court did Not Base its Decision on an Adequate Independent State Ground.

A. *The Decision Below is Devoid of Reference to a State Ground for Decision.*

The decision below makes no reference to Part I, Article XII, of the Declaration of Rights, Constitution of Massachusetts. The decision below, in addition to a brief attempt to distinguish *Michigan* v. *Tucker*, 417 U.S. 433 (1974), as not controlling, does refer to two previous state court decisions; one construing the constitutional requirements of the

Fourth Amendment (*Commonwealth* v. *Hall*, 366 Mass. 790, 795 [1975]), and one construing the application of the exclusionary rule as required by *Miranda* v. *Arizona*, *supra* (*Commonwealth* v. *Haas*, ____ Mass. ____, Mass. Adv. Sh. [1977] 2212, 369 N.E. 2d 692). Neither of the referenced state decisions contains any reference to the application of Article XII of the Declaration of Rights. Indeed, the majority opinion in *Haas* clearly relies upon *Miranda* v. *Arizona*, *supra*, and *Brown* v. *Illinois*, 422 U.S. 590 (1975). *Haas*, Mass. Adv. Sh. (1977) at 2216-2225. The concurring opinion in *Haas* refers not to any state ground, but to federal standards, as requiring the decision reached in that case.

> "We are bound by decisions of the Supreme Court of the United States to hold that there was error both as to the motions to suppress and as to the improper argument of the prosecutor. . . .[T]he rulings we are required to make under *Miranda* v. *Arizona* . . . are unjust . . . ." *Haas* at 2236 (concurring opinion, Braucher, J.).

See generally *Commonwealth* v. *Dustin*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2302, 368 N.E. 2d 1388.

In no case involving the application of *Miranda* has the Supreme Judicial Court based its decision on other than what it viewed as federal constitutional requirements. Indeed, in the sole case in which that court has considered the issue, it refused to hold, in a *Miranda*-related context, that Article XII of the Declaration of Rights provided greater protection to defendants than is provided by the United States Constitution. The court rejected a defendant's invitation to hold that, under Article XII, the court need not adopt this Court's decision in *Harris* v. *New York*, 401 U.S. 222 (1971), permitting the use for impeachment purposes of statements elicited in violation of

Miranda safeguards. *Commonwealth* v. *Harris*, 364 Mass. 236, 238-239 (1973).

Moreover, there is no support in Massachusetts law for the proposition that the Supreme Judicial Court would decide a case on a specific state constitutional provision without reference thereto. To the contrary, where decision has rested on an independent state ground, the court has specifically addressed the constitutional or statutory provision on which judgment is based. See generally *Commonwealth* v. *O'Neal*, ____ Mass. ____, Mass. Adv. Sh. (1975) 3502, 339 N.E. 2d 676 (death penalty is unconstitutional under Massachusetts Declaration of Rights); *Commonwealth* v. *Possehl*, 355 Mass. 575 (1969) (state and federal constitution require that a blood grouping test be provided without charge to an indigent defendant in a paternity suit); *Blaisdell* v. *Commonwealth*, ____ Mass. ____, Mass. Adv. Sh. (1977) 1307, 364 N.E. 2d 191 (constitutionality of statute providing for court-ordered psychiatric examination construed under the Fifth Amendment to the United States Constitution and Article XII of the Declaration of Rights); *Commonwealth* v. *Jones*, 362 Mass. 497 (1972) (violation of defendant's statutory right to use a telephone compels exclusion of evidence). Indeed, the respondent's most recent submission of *Board of Selectman of Framingham* v. *Municipal Court of the City of Boston*, ____ Mass. ____, Mass. Adv. Sh. (1977) 2541, 369 N.E. 2d 1145, demonstrates the court's practice of articulating the basis for its decision.

> "In the present circumstances, the protection of the privacy of the individual and the necessity for preserving confidence in the processes of government, rather than encouraging contempt for them, require that the evidence be held inadmissible. We reach this result as

matter of Massachusetts law, even though it may not be required by the Federal Constitution." 369 N.E. 2d at 1148.

B. *The Ground for the Decision Below is Not Ambiguous.*

The instant case simply does not present an ambiguity as to the ground for judgment below. Compare *California* v. *Krivda*, 409 U.S. 33 (1972), which was remanded for determination of the ground for judgment where the court below cited excerpts from an earlier decision which relied specifically upon both state and federal provisions.

Commonwealth v. *Romberger*, 464 Pa. 488, 347 A. 2d 460 (1975), also provides little support for respondent. That case was remanded not to resolve any ambiguity in the basis for the lower court's decision, but for reconsideration in light of *Michigan* v. *Tucker*, *supra*. The Pennsylvania court then applied state law. However, the speculative possibility that Massachusetts might in the future construe Article XII to be applicable to the particular circumstances of the instant case does not justify avoidance of the federal question presented in the present posture of this case.

Petitioner suggests that this Court has the authority to review the substantial federal question presented in the present posture of this case. To render that authority unavailing to the Commonwealth based upon the mere speculative suggestion that the state court *may* have based its decision on an unarticulated state ground would constitute an abdication of this Court's ultimate responsibility to decide federal constitutional law. See *Herb* v. *Pitcairn*, 324 U.S. 117, 131 (1945) (Black, J., dissenting). As the Court has stated, the mere

> "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973).

See also *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967).

III. The Statement was Not Involuntary as Contemplated by the Fifth Amendment.

The test for determining voluntariness of a confession under the Due Process Clause is whether the will of a defendant was overborne. If his will is found to have been overborne, the confession cannot be deemed to be "the product of a rational intellect and a free will." *Reck* v. *Pate*, 367 U.S. 433, 440 (1961).

In reaching this determination, all the circumstances attendant to taking the confession must be taken into account. These factors include evidence of physical abuse (*Brown* v. *Mississippi*, 297 U.S. 278 [1936]); evidence of psychological coercion or deception (*Brewer* v. *Williams*, 430 U.S. 387 [1977], *Spano* v. *New York*, 360 U.S. 315 [1959]); the length of detention (*Ashcraft* v. *Tennessee*, 322 U.S. 143 [1944]); and the amount and manner of interrogation (*Turner* v. *Pennsylvania*, 338 U.S. 62 [1949]). In the instant case, the record is devoid of any evidence of physical or psychological coercion or deception. There was no interrogation on the original charge of driving under the influence; the statement in question was the response to a single question put in response to a conversation initiated by the defendant.[1] The defendant was not held

[1] Compare *Michigan* v. *Mosley*, 423 U.S. 96 (1975), in which this Court eschewed any blanket prohibition against further interrogation of a de-

incommunicado nor was the detention for any appreciable length of time. The single factor which could be pointed to as suggestive of involuntariness is that the defendant registered a .13 reading on the breathalyzer and exhibited some motor impairment.[2]

Petitioner suggests that comparison of the circumstances and the condition of the defendant in the instant case with the circumstances which have supported a finding of involuntariness is instructive. See generally, *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant found to be mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant, insane and incompetent, confessed after 8-9 hours of incommunicado interrogation).

Finally, petitioner suggests that respondent's attempt to argue that the defendant's free will was so overborne as to be comparable to the situtation presented in *Townsend* v. *Sain*, 372 U.S. 293 (1963), does not bear analysis.

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fendant, under all circumstances, after he had asserted his right to remain silent. *Id.* at 102.

[2]It should be noted that the Massachusetts legislature, on the recommendation of the Commissioner of Public Safety, lowered the presumptive level from .15 to .10 in 1972, to conform with the National Highway Safety Act of 1966, which set a .10 standard for the presumption. See *Mass. House Doc.* 152, 154 (1972). The Report of the Commissioner of Transportation submitted to Congress in 1968 enumerated the particular effects of alcohol on driving skills which justified the establishment of the presumption at .10. Those effects fell into the areas of spatial judgment, vision, coordination and the ability to concentrate on two things (such as steering and watching traffic signals) at the same time. Secretary of Transportation, *Report To The Congress, Alcohol and Highway Safety* (1968); Freeman, Brian, *Drunk Driving Cases: Prosecution and Defense*, Practicing Law Institute (1970). It is submitted that any correlation between the effect of alcohol on physical and perceptual skills and the effect on ability to make a voluntary (uncoerced) statement is minimal.

In *Townsend*, the defendant was administered phenobarbital and hyoscine, a drug which acts as a "truth serum." Clearly, the area affected by such a drug encompasses the very faculty involved in the exercise of free will. The drug acts to compel one to tell the truth and destroys the ability to refuse to tell the truth. As the court stated,

> "[i]t is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a 'truth serum.'" *Townsend* at 307-308.

No comparable substance was administered to the defendant in the instant case. Indeed, the defendant's condition was solely the result of his own actions.

The petitioner suggests that it is inconsistent to claim that the defendant was capable of understanding his rights and of exercising his right to remain silent and to have the assistance of counsel, and then to claim involuntariness and incapacity as to his statement. Moreover, such a claim ignores the findings of the trial court, which found only that the Commonwealth had failed to meet its "heavy burden" of demonstrating that the defendant had "knowingly and intelligently waived" his privilege against self-incrimination and right to counsel. *Findings and Rulings* (App. 63). While the courts of Massachusetts have indicated that special care must be taken to ensure that a defendant has not unknowingly waived his constitutional rights while under the influence of drugs or alcohol, the presence of such an influence does not automatically invalidate a waiver (*Commonwealth* v. *Hooks*, ____ Mass. ____, Mass. Adv. Sh. [1978] 1356, 1361, 376 N.E. 2d 857), let alone, the Commonwealth submits, automatically render a statement involuntary.

Respondent appears to ignore the distinction between waiver and the question whether a person has acted voluntarily. The distinction has been articulated by this Court, at least insofar as "trial rights" are concerned. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 238 n.25 (1973). See also *Brady* v. *United States*, 397 U.S. 742, 749 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970). Petitioner submits that the pretrial protections required by *Miranda* are similarly designed to protect the fairness of the trial itself and that the waiver and voluntariness distinction is equally applicable here.

"Waiver" has been described as "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Thus, lack of waiver may be found if the circumstances reveal that a defendant's actions were unintentional or that the defendant did not possess sufficient knowledge of his rights to make an intelligent decision. Neither finding leads necessarily to the conclusion that a defendant's "will was overborne," or that his statement was extracted by any sort of threat or violence, or direct or implied promises, or by exertion of improper influence. *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897).

Petitioner submits that to jump from a finding that the Commonwealth has failed to demonstrate a knowing and intelligent waiver to the conclusion that a statement was involuntary in the Fifth Amendment sense is to stretch the concept of compulsion beyond all reasonable bounds.

IV. The "Fruit of the Poisonous Tree" Doctrine is Not Triggered Where the Initial Illegality does Not Violate a Constitutional Right.

The cases relied upon by respondent do not compel a finding that the "fruit of the poisonous tree" doctrine is applicable to

the instant case. In *People* v. *Robinson*, 48 Mich. App. 253, 210 N.W. 2d 372 (1973), the court applied the "fruit of the poisonous tree" doctrine to suppress evidence derived by police from a defendant's *involuntary* statement. Relying upon *Kastigar* v. *United States*, 406 U.S. 441 (1972), the court reached the conclusion that a Fifth Amendment branch of the poisonous tree doctrine had always been available "as an essential element of the Fifth Amendment guarantee." 210 N.W. 2d at 376.[3] This holding is not inconsistent with petitioner's assertion that the doctrine, if applicable at all, is only applicable where the initial statement is a product of compulsion or is otherwise involuntary.[4] See also *United States* v. *Harrison*, 265 F. Supp. 660 (S.D. N.Y. 1967); *United States* v. *Pellegrini*, 309 F. Supp. 250 (S.D. N.Y. 1970).

The automatic exclusion of real probative evidence based solely on the existence of a causal connection between that evidence and a statement taken in technical violation of

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[3] It should be noted that the court also relied upon *Tucker* v. *Johnson*, 352 F. Supp. 266 (E.D. Mich. 1972), subsequently reversed by this Court. *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

[4] Such an approach approximates the proposal in A.L.I. *Model Code of Pre-Arraignment Procedure*, §§ 150.2-150.4, requiring that the violation be established as substantial before derivative conditions enumerated in § 150.3 of the Code, defining substantially, are present in the instant case.

> "a. The violation was gross, wilful and prejudicial to the accused. A violation shall be deemed wilful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it.
>
> "b. The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement.
>
> "c. The violation created a significant risk that an incriminating statement may have been untrue."

Pre-Arraignment Code, § 150.3.

Miranda v. *Arizona* is, the Commonwealth suggests, arbitrary and without justification. While application of the exclusionary rule may indeed deter future police misconduct, reasonable application of that rule should be premised only on a finding of wilful disregard of a specific constitutional right or an intentional practice. The deterrent effect on an unintentional impropriety, at most a mistake in judgment, is difficult to imagine.

Conclusion.

For the reasons stated in its brief and in this reply brief, the Commonwealth respectfully requests this Court to reverse the judgment of the court below.

Respectfully submitted,

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